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No. 08-1019

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In The
Supreme Court of the United States

CELSA HILAO, DANILO DE LA FUENTE, RENATO PINEDA, ADORA DEVERA, RODOLFO BENOSA, JOSE DURAN, JOSEFINA FORCADILLA, ARTURA REVILLA AND CHRISTOPHER SORIA,

Petitioners,

v.

REVELSTOKE INVESTMENT CORPORATION, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

The central question presented by the Petition is whether federal law, not state law, determines when a federal judgment on a federal cause of action accrues for sunsetting purposes. Thousands of federal judgments on federal causes of action are entered by federal courts each year. Because of the conflict among the circuits there is no certainty as to the length of time federal judgments may be enforced, and judgment creditors and debtors are left to guess. This Court should grant certiorari in this case to resolve the conflict.

ARGUMENT

I. Deferral of Decision on this Petition Is Appropriate Until the Hawai'i Supreme Court Decides the Certified Question

The Supreme Court of Hawai'i accepted the certified question for decision, Pet.App.31a, and the briefing in that Court is now complete. The Supreme Court of Hawai'i, well aware of the Ninth Circuit's opinion in this case, would not have accepted the question for decision had it believed that its decision in *International Savings & Loan Ass'n, Ltd. v. Wiig,* 921 P.2d 117 (Haw. 1996) – which the Ninth Circuit relied upon – answered the question. Revelstoke tries to exploit the reservation in that Court's order (that it has not yet conclusively decided whether to answer the certified question), but such a reservation is

common among state high courts adjudicating certified questions from federal courts.[1]

Since this Petition was filed, the Hawai'i Intermediate Court of Appeals issued a divided opinion interpreting Haw. Rev. Stat. § 657-5. *Estate of Roxas v. Marcos*, ___ P.3d ___, 2009 WL 352878 (Haw. Int. App. Feb. 12, 2009).[2] Although a two-judge majority held that the ten year period of Haw. Rev. Stat. § 657-5 accrued upon entry of a state court judgment, a vigorous dissent contended that this Court's decision in *Borer v. Chapman*, 119 U.S. 587 (1887) mandated the conclusion that the ten year period did not accrue until after all appeals were resolved. Neither the majority nor the dissent could cite any definitive decision of the Supreme Court of Hawai'i on the issue. Therefore, the decision of the Supreme Court of Hawai'i on the certified question will be the first authoritative interpretation of the meaning of Section 657-5.

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[1] At page 11 of its Brief in Opposition, Revelstoke omitted the first two words in the quote from the Supreme Court of Hawai'i's order which stated "**without conclusively** determining whether this court will answer the question . . . " (emphasis added). Pet.App.32a.

[2] The majority opinion casts doubt on the Ninth Circuit's interpretation of Hawai'i Supreme Court precedent. It stated that *International Savings & Loan Ass'n, Ltd. v. Wiig*, 921 F.3d 117 (Haw. 1996) – relied upon by the Ninth Circuit – was limited to the "narrow issue" of interpreting the first sentence of H.R.S. § 657-5, not the third sentence. 2009 WL 352878 at 4. The Ninth Circuit applied *Wiig* to the third sentence.

Revelstoke implies some impropriety on the part of the federal district court for certifying a question to the Supreme Court of Hawai'i. When the issue of interpretation of H.R.S. § 657-5 arose a second time in MDL 840, a consolidated proceeding, it was entirely appropriate for the district court to propose, *sua sponte,* certification of the issue to the state court. The certification was a proper exercise of federal/state comity to ask the state's highest court for an authoritative interpretation on an issue the federal court could only predict. Counsel for all parties were present or participated by telephone.[3] All counsel participated in drafting a proposed order and submitting it to the court for approval. No one appealed the order. Certainly Revelstoke was not disadvantaged. It intervened before the Supreme Court of Hawai'i and filed an extensive *amicus* brief in support of the Marcos Estate.

II. Petitioners Raised All of the Proposed Questions in the Courts Below

The question whether federal or state law controlled the sunsetting of the Class's judgment was the central issue in both the district court and court of appeals. The district court ruled that federal law

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[3] In 1991, certain class counsel were appointed by the court as lead and liaison counsel for all the consolidated cases in MDL 840, including the *Sison/Piopongco* cases. So the presence and participation of class counsel at the hearing was routine and proper.

applied to the expiration of a federal judgment on a federal cause of action, and that the judgment was not final until the court of appeals issued its mandate after affirming the judgment for the Class. Pet.App.23a. Before the Ninth Circuit, Petitioner specifically raised in its Opposition Brief, in the "Questions Presented On Appeal," the issue of when a federal judgment accrues for sunsetting purposes:

> In the alternative, whether the District Court ruled correctly that any statute of limitations applicable to Judgment of the Class of Human Rights Victims did not start until after this Honorable Court affirmed the lower court's rulings (on December 17, 1996) and returned the mandate to the District Court (on January 8, 1997)?

Appellees' Br. at 5 (Aug. 25, 2006). The court of appeals reversed the district court's application of federal law, concluded that state law determined when the time period of a sunsetting statute begins, and then predicted how the Hawai'i statute should be interpreted, even though no authoritative interpretation had been made by any state appellate court. Pet.App.1-21a.

The question of when a Rule 58 final judgment was entered was always before the courts below, because a time period and a start date are essential before enforcement of a judgment may be held to have expired. The district court did not originally determine when the Rule 58 judgment had been entered because it ruled that the operative date for

the beginning of the running of a sunsetting statute was when the mandate was returned by the court of appeals. Subsequently, the district court ruled that the Rule 58 final judgment was entered on December 6, 1995. Pet.App.29a. The court of appeals reversed but never addressed the date the final judgment was entered. As a result, the question was raised specifically in a petition for rehearing.

Certification of a question to the Supreme Court of Hawai'i was proposed by Petitioners in their rehearing petition in the Ninth Circuit. This Petition does not claim error on the part of the court of appeals for not certifying the question, but now that the issue has been certified and now that the Supreme Court of Hawai'i has accepted the issue for decision, it is appropriate for this Court to defer decision on this Petition until that Court rules.

Therefore, Petitioners raised in the courts below all the questions in this Petition. In the very case cited by Revelstoke, *Yee v. City of Escondido*, 503 U.S. 519, 534-35 (1992), this Court stated:

> Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below (citations omitted)
>
> * * *
>
> A litigant seeking review in this Court of a claim properly raised in the lower courts thus generally possesses the ability to frame

the question to be decided in any way he chooses, without being limited to the manner in which the question was framed below.

III. The Ninth Circuit Decision Conflicts with *Borer*, *Jalapeno* and *Home Port Rentals*

The question of whether state law controls the accrual of a federal judgment was described by the Ninth Circuit as "novel," *In re Estate of Ferdinand E. Marcos Human Rights Litigation*, 536 F.3d 980, 982 (9th Cir. 2008), but Revelstoke nonetheless argues that the Ninth Circuit's conclusion is based on a "well-settled principle." Opp.Br. at 22. Tellingly, Revelstoke cannot cite any case to support this "well-settled principle" except for the Ninth Circuit's opinion below. Nor can the Ninth Circuit decision be reconciled with this Court's decision in *Borer* or the Fifth and Sixth Circuit's decisions in *Home Port Rentals* and *Jalapeno*.

In *Borer*, this Court stated the general common law principle that a state sunsetting statute does not begin to run on a federal judgment until all appeals are completed. The principle stated in *Borer* cannot be limited to the specific facts of that case as suggested by Revelstoke. "Principles formulated by federal judicial law have been thought by this Court to be necessary to protect uniquely federal interests." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 426 (1964). *Borer* has been cited in later decisions of this Court and has never been limited or overruled. The adoption of Rule 69(a) did not, *sub silentio*,

undermine the *Borer* principle, and this Court has cited *Borer* after adoption of Rule 69(a). *See United States v. Wurts*, 303 U.S. 414 (1938). Furthermore, the federal registration statute, 28 U.S.C. § 1963, employs the principle embodied in *Borer* by providing that a judgment is not ripe for transfer from one district to another until "the judgment has become final by appeal or expiration of the time for appeal."

Revelstoke is incorrect in contending that *Home Port Rentals, Inc. v. International Yachting Group, Inc.*, 252 F.3d 399 (5th Cir. 2001) and *Jalapeno Prop. Mgmt., LLC v. Dukas*, 265 F.3d 506 (6th Cir. 2001) did not employ a federal accrual date for the running of the state sunsetting periods. In *Home Port Rentals*, the Fifth Circuit found that the ten-year prescriptive period under South Carolina law did not commence until after appeals were complete on the federal judgment even though the South Carolina statute would have commenced running upon entry of the trial court's judgment. 252 F.3d at 406. In doing so, it applied federal common law by looking to the standard set forth in Section 1963. Likewise in *Jalapeno*, the Sixth Circuit reversed the district court which, applying state law, had ruled that the ten-year prescription period commenced after the federal judgment was first entered. 265 F.3d at 510. The Sixth Circuit applied federal common law in concluding that "the ten-year [Tennessee] statute of limitations did not begin to run until after this court had issued its second mandate." *Id.* at 514.

Accordingly, the Ninth Circuit's decision is in direct conflict with *Borer*, *Home Port Rentals* and *Jalapeno*.

IV. The Ninth Circuit's Fundamental Error in Ignoring the Date the Rule 58 Judgment Was Entered Warrants Vacating and Remanding

The Petition conclusively demonstrates that, as later held by the district court, Pet.App.29a, a Rule 58 judgment was not entered until December 6, 1995, less than 10 years before the judgment was transferred to Texas. The Ninth Circuit simply ignored this and assumed that the February 1995 order was the Rule 58 judgment. But docket entries do not lie. The arguments raised by Revelstoke exalt form over substance. It contends that the title on a court order or the clerk's stamp at the top of a court order renders it a Rule 58 judgment. Opp.Br. at 26. This cannot be or else all orders having the word "judgment" in their title would automatically become Rule 58 judgments. That outcome would render superfluous Rule 54(b) and this Court's opinion in *United States v. Indrelunas*, 411 U.S. 216 (1973), where this Court interpreted Rule 58 to require that "every judgment shall be set forth on a separate document" signed and entered on the docket by the clerk. *Id.* at 222. Revelstoke offers no explanation as to what purpose or meaning the December 6, 1995 entry serves if not as a Rule 58 final judgment. Rather, it simply wishes this Court to ignore the docket entries and the single

judgment entry of December 6, 1995 signed by the clerk which constitutes the final Rule 58 judgment in the consolidated litigation.

Revelstoke also argues that in the months between February and December 1995 Petitioners took action based on the February 1995 "judgment" order and that the Marcos Estate filed an appeal from the February 1995 order. Parties do not determine what is a Rule 58 final judgment, docket entries do. What Revelstoke fails to mention is that the Estate, like other appellants, filed successive appeals as posttrial motions were resolved to ensure that its appellate rights would be protected. The Ninth Circuit only had appellate jurisdiction from a final judgment, which was the December 6, 1995 judgment. Whatever confusion existed in the period leading up to December 1995 as to the finality of judgment orders under Rules 54(b) and 58(b) entered in the consolidated cases, the entry of the Rule 58(b) order by the clerk on December 6, 1995 resolved the issue.

Because it is incontrovertible on this record that a Rule 58 final judgment was entered less than 10 years before the judgment was transferred to Texas, the judgment registered in Texas was valid, enforceable and began a new enforcement period under Texas law. The Texas judgment, not the Hawai'i judgment, was the only one which affected Revelstoke. For that reason, Revelstoke had no Rule 24 property interest whatsoever in the Hawai'i judgment and its intervention was improper. Accordingly, the Ninth Circuit's opinion in this matter should be

vacated and the matter remanded to the Ninth Circuit with instructions to affirm the district court's decision.

CONCLUSION

For all the foregoing reasons Petitioners respectfully urge this Court (1) to defer consideration of this Petition until the Hawai'i Supreme Court has ruled on the certified question of state law central to this appeal, and (2) then grant certiorari to review the issues presented. In the alternative, this Court should vacate the Ninth Circuit's opinion and remand the case with instructions to affirm the decision of the district court.

Respectfully submitted,

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